No. 90-483

In The

Supreme Court of the United States

October Term, 1990

JASON WILLIAMS,

Petitioner,

v.

PIMA COUNTY; THE PIMA COUNTY MERIT COMMISSION; AND CLARENCE DUPNIK, Sheriff of Pima County,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF OF PIMA COUNTY MERIT COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. CAN A PETITION FOR WRIT OF CERTIORARI BE GRANTED WHEN THE JUDGMENT APPEALED FROM IS NOT A FINAL JUDGMENT?

B. CAN A SHERIFF'S DEPARTMENT INTERNAL AFFAIRS INTERVIEW PRIOR TO THE DISCHARGE OF AN EMPLOYEE, AT WHICH INTERVIEW THE EMPLOYEE IS ADVISED OF THE CONCERNS AND EVIDENCE WHICH MAY LEAD TO DISCHARGE AND IS GIVEN AN OPPORTUNITY TO RESPOND, SATISFY THE PRE-TERMINATION HEARING REQUIREMENTS ENUNCIATED IN *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL*, 470 U.S. 532 (1985)?

C. SHOULD THE UNITED STATES SUPREME COURT GRANT A PETITION FOR WRIT OF CERTIORARI REGARDING A CONTESTED FIFTH AMENDMENT ISSUE WHERE THERE IS AN INDEPENDENT, SUFFICIENT STATE GROUND FOR THE LOWER COURT'S DECISION?

D. DOES A PUBLIC EMPLOYER'S STATEMENT THAT AN EMPLOYEE MUST ANSWER QUESTIONS AND THAT THE ANSWERS WILL NOT BE USED IN ANY CRIMINAL PROCEEDINGS CONSTITUTE A SUFFICIENT GRANT OF IMMUNITY THAT THE EMPLOYEE MAY BE DISCHARGED FOR FAILURE TO ANSWER SAID QUESTIONS?

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STATEMENT OF THE CASE

In October, 1979, Jason Williams was hired as a Corrections Officer by the Pima County, Arizona, Sheriff's Department. On September 13, 1982, Williams was discharged from his position. His termination stemmed from an Internal Affairs investigation which had been instituted to determine Williams' involvement in two similar incidents involving young women who had been pulled over late at night by a man posing as a law enforcement officer (the "traffic stops"). Appendix F, A-32.[1]

As a result of the investigation into these incidents, Pima County Sheriff's Officers executed a search warrant at Williams' residence on August 13, 1982. During the search, officers found various court and Sheriff's Department records, booking slips, and many weapons. As a result of this search and other evidence concerning Williams and the traffic stops, Williams was placed on administrative leave on August 19, 1982, pending further investigation.

On September 7 and 8, 1982, an Internal Affairs Investigator from the Pima County Sheriff's Department conducted tape-recorded interviews with Williams. Williams and his attorney were told, prior to the commencement of the interview, that the purpose of the interview was to take Williams' statement regarding the traffic

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[1] All references to Appendices A-P are to those Appendices attached to Petitioner's Petition For Writ Of Certiorari. Appendix 1 is attached to this Opposition.

stops. Appendix N, A-63 - A-65; Appendix P, A-101. They were further informed that the Sheriff's Department had some questions about department records which had been found in Williams' residence during the search. Appendix N, A-63; Appendix P, A-100. The interviewer informed Williams' attorney that these questions were part of the Internal Affairs investigation and not part of any on-going criminal investigation. Appendix N, A-64. Further, he was informed that his answers would not be used against him in any criminal investigation. He was informed several times that he could be fired if he refused to cooperate fully with the Internal Affairs investigation by answering those questions. Appendices N, A-64 and O, A-98.

Williams was then questioned about his potential involvement in the traffic stops. Appendix O, A-72 - A-88. He was also questioned about the documents discovered at his residence during the search. Appendix O, A-89 - A-95. He was informed that the possession of these documents was a violation of the department's rules; in fact, the interviewer quoted the rule to him. Appendix O, A-91.

Williams subsequently refused to answer any questions concerning the traffic stops, asserting instead his Fifth Amendment privilege against self-incrimination. While the subject matter of the criminal investigation and the Internal Affairs interview was the same, at least as to Williams' involvement in the traffic stops, Williams was assured numerous times that the Internal Affairs interview had no relationship to the criminal investigation, and that his responses to questions during the Internal

Affairs interview would not be part of the criminal proceedings. Appendix N, A-64. Appendix P, A-99.

It is also clear from the transcript of the interview that Williams knew, both from the Internal Affairs investigator and from the Sheriff, himself, that his refusal to answer questions could and would result in his termination. Appendix N, A-64 - A-69. Williams knew then, at the interview, that his refusal at the Internal Affairs investigation to answer questions related to his potential involvement in the traffic stops was unacceptable and, further, that the unauthorized possession of departmental records at his residence was a violation of departmental rules and regulations. He knew that he could be terminated. Williams availed himself only of the opportunity to explain his possession of those documents.

Williams was subsequently served with the Notice of Termination. The Notice was consistent with the information given at the interview: he was being terminated for failing to cooperate with an Internal Affairs investigation, and for mishandling official departmental documents and records, in violation of Pima County Sheriff's Department Manuel Section 7.01 5, 7.02 6 and 7.05 7. Appendix G, A-38.

At Williams' post-termination hearing, the evidence was restricted to two issues: whether Williams was properly terminated for failing to cooperate in an Internal Affairs investigation and whether he was properly terminated for violating departmental rules and regulations with regard to the handling of departmental records. No testimony was introduced by the Pima County Attorneys' Office regarding Williams' alleged involvement in the

traffic stops. The testimony on that issue related solely to the question of whether Williams could properly have refused to answer questions at the interview. Appendix F, A-36.

After the discharge, a full, adversary hearing was conducted before the Pima County Merit Commission, and the hearing officer at the post-termination hearing found that Williams had been properly terminated on both of the above grounds. Williams appealed this decision to the Pima County Superior Court, which reversed the Commission's decision. The Pima County Merit System Commission, Pima County, and Clarence Dupnik, Sheriff of Pima County, appealed to the Arizona Court of Appeals which, on December 14, 1989, reversed the trial court's ruling and ordered Williams' termination affirmed. While the appellate court did rule on the constitutional issues presented by Williams, the decision also reflects that an independent basis, unrelated to Williams' constitutional claim, *i.e.*, the unauthorized possession of departmental records, existed for Williams' termination. Appendix C, A-16.

On September 17, 1990, Judgment was entered in the Superior Court of Pima County, pursuant to the mandate previously issued by the Arizona Court of Appeals. On September 28, 1990, Petitioner herein filed a Motion For New Trial, pursuant to Rule 59 of the Arizona Rules of Civil Procedure. Appendix 1.

SUMMARY OF ARGUMENTS

A. The Petition For Writ Of Certiorari should be denied because the Petitioner has now filed a Motion For New Trial in connection with this matter in the Pima County Superior Court, State of Arizona. By filing the Motion For New Trial, Petitioner has demonstrated that the decision which Petitioner seeks to have reviewed is not final. 28 U.S.C. § 1257 provides for the grant of a writ of certiorari only from a "final" decision, and it is well settled that this Court will not, as a rule, review decisions which are either not final or subject to further modification at the state level.

B. Although the Petitioner's discharge occurred over 2 years before this Court's decision in the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the Petitioner received notice and an opportunity to be heard in connection with his discharge prior to its occurrence. The Internal Affairs interview which preceded his discharge satisfied all due process requirements identified in the subsequent *Loudermill* decision.

C. The decision of the Arizona Court of Appeals, affirming the Merit System Commission's decision on the grounds of Petitioner's unauthorized possession of departmental records, was predicated upon a sufficient, independent ground for Petitioner's discharge; accordingly, this Court should not address Petitioner's Fifth Amendment claim.

D. Even in the absence of a sufficient, independent state ground for his discharge, Petitioner's Fifth Amendment rights were not violated because the Petitioner was

given a sufficient grant of immunity by an agent of the Sheriff's Department. The statement to the Petitioner that his answers would not be used in any criminal proceeding was sufficient to require that he answer the questions posed to him. Furthermore, the questions were sufficiently related to his employment as a corrections officer for the Pima County Sheriff's Department to permit the Sheriff's Department to discharge him for his failure to respond.

ARGUMENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT APPEALED FROM IS NOT A FINAL JUDGMENT.

It is well settled that this Court will not, as a rule, review judgments of lower tribunals until a final judgment is entered. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). This "final judgment" rule helps prevent interference with state proceedings when the underlying dispute may ultimately be resolved at the state level. *Costarelli v. Massachusetts*, 421 U.S. 193, 95 S.Ct. 1534, 44 L.Ed.2d 76 (1975). It could be interpreted to preclude review by the Supreme Court "where anything further remains to be determined by a state court. . . . " *Radio Station WOW, Inc., supra*, 326 U.S. at 124, 65 S.Ct. at 1478, 89 L.Ed. 2092. See also 28 U.S.C. § 1257.

However, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), this Court articulated four exceptions to the finality doctrine. The Supreme Court, in its discretion, may review non-final judgments if (1) the federal question present is conclusive or the result of the pending state court proceedings are preordained; (2) where the federal issue will survive and require review regardless of the outcome of future state court proceedings; (3) where the federal question is finally decided but later review of the federal question cannot be had regardless of the outcome of the state proceedings, and (4) where the federal issue was finally decided with state court proceedings still pending where the Petitioner could be successful on the merits on non-

federal grounds and where reversal of the state court on the federal issue would preclude any further litigation on the relevant cause of action rather than merely controlling the nature and character of further proceedings. *Cox Broadcasting v. Cohn, supra.*

Petitioner filed his Petition For Writ of Certiorari with this Court on September 17, 1990. On or about September 28, 1990, Petitioner filed a Motion for a New Trial in the Superior Court of Arizona, Pima County. In his Motion, Petitioner raises additional non-federal issues not raised by Petitioner in the Court of Appeals. Appendix 1. As a result of this motion, state court proceedings are still pending and the judgment which Petitioner seeks to have reviewed in this Court is not "final" as contemplated by the finality doctrine set out by this Court. Further, Respondent submits that none of the *Cox Broadcasting* exceptions to the finality doctrine apply here. The federal issues raised by Petitioner are certainly not conclusive of the litigation, nor is the result of the pending proceedings preordained. Petitioner could prevail on his newly raised non-federal issues and be reinstated, thereby obviating any need for this Court to review the federal questions presented in the Petition. Further, should Petitioner be unsuccessful, federal review of the federal issues raised by Petitioner is still available and not precluded by the outcome. Finally, no federal policy is at risk should the Court deny review, and review at this point would not dispose of or control the outcome of any further state court proceedings.

Respondent submits that review of the Arizona Court of Appeals' decision of December 14, 1989, by this Court

would be premature, and that the Petition should be denied on that ground.

B. PETITIONER WAS AFFORDED A PRE-TERMINATION HEARING CONSISTENT WITH THIS COURT'S DECISION IN *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL.*

Petitioner claims that the Arizona Court of Appeals' decision on the pre-termination hearing issue is unconstitutional and inconsistent with this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). However, the adoption of the Petitioner's position would require a reinterpretation of *Loudermill* to require a much more formalized pre-termination proceeding. Even if the Court were inclined to reconsider the flexible pre-termination procedures mandated in that case, the facts of Mr. Williams' case do not merit review, let alone modification of the *Loudermill* decision.

At the outset, it should be noted that this case arose in 1982, over two years before this Court's decision in *Loudermill*.[2] Thus, it should come as no surprise that the

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[2] At the time of Williams' discharge, Arizona law was clear to the effect that a pre-termination hearing was not required when there were adequate post-termination procedures. *City of Flagstaff v. Superior Court*, 116 Ariz. 382, 569 P.2d 812 (1977); *Montes v. Lininger*, 119 Ariz. 174, 580 P.2d 6 (App. 1978); *Roberts v. City of Tucson*, 122 Ariz. 91, 593 P.2d 645 (1979); *Bower v. Arizona State School for the Deaf and the Blind*, 146 Ariz. 168, 704 P.2d 809 (App. 1984). (Interestingly, the Arizona Supreme Court denied review of the *Bower* case on the same day that *Loudermill* was decided, March 19, 1985.)

names applied to various parts of the process were not the same as those used in the *Loudermill* decision. Nevertheless, whether it was designated as a "pre-termination hearing" or as an "Internal Affairs Interview," Jason Williams received "some kind of hearing", as contemplated in *Loudermill*; he was clearly provided with notice and an opportunity to be heard; he had the opportunity to prevent a mistaken decision. Indeed, he was virtually begged to provide answers to questions.

Furthermore, the Petitioner's characterization of the reasons for his discharge must be carefully scrutinized. Contrary to the implications set forth in the Petition, Williams was not discharged because he was suspected in connection with the traffic stops. He was discharged because he possessed Sheriff's Department records in his house, in violation of Departmental rules and regulations, and because he refused to answer questions in an interview concerning those records and the traffic stops.

Williams was afforded a pre-termination procedure which satisfies the requirements of *Loudermill* and the cases leading to it. The cornerstone of the due process procedures set out in *Loudermill* is flexibility. The amount and nature of due process required at the pre-termination stage should be determined by the facts of the case, including the availability of full post-termination administrative and judicial review. *Loudermill*, 470 U.S. 532, 540 (1985).

The Arizona Court of Appeals correctly applied this flexible due process analysis to the facts of this case, including the fact that Williams had access to and availed himself of a full range of post-termination procedures.

The transcripts and records available to this Court in Petitioner's Petition as Appendices G, N, O, and P demonstrate that Williams was aware of the subject matter of his employer's concerns: his alleged involvement, while posing as a law enforcement officer, in unlawful stops of young women at night, as well as his possession of departmental records and documents at his home in violation of department rules and regulations. He was also apprised of the evidence against him, particularly the documents discovered in his home, and he was given every opportunity to present an explanation of these concerns. He refused to present any explanation regarding his potential involvement in the traffic stops, but offered some explanation of his possession of departmental documents. Williams was aware that his refusal to cooperate with the interviewer could result in his termination. Appendix N, A-64.

Petitioner would interpret *Loudermill* to require *written* notice of the potential termination, the grounds therefor and an opportunity to respond *in writing*. Not only is this explicitly not the holding of the case, *Loudermill*, 470 U.S. 532, 540, 105 S.Ct. 1487, 1495 ("The tenured public employee is entitled to oral or written notice. . . . "), it would serve no purpose to require written notice and an opportunity to respond in writing in this case. Petitioner based his refusal to explain his activities on Fifth Amendment grounds. Had his employer given him written notice and an opportunity to respond in writing, Petitioner would still have raised the Fifth Amendment as a reason not to respond and he would have been terminated for failing to cooperate with an Internal Affairs

investigation, as well as for violating the department's rules regarding the documents.

This Respondent submits that the interview in this case, coupled with the extensive post-termination procedures available, satisfied the due process requirements of *Loudermill* and served as that initial check against mistake which *Loudermill* was intended to provide. *Loudermill*, 470 U.S. 532, 540, 105 S.Ct. 1487, 1495. The Arizona Court of Appeals' decision is entirely consistent with the concepts enunciated in *Loudermill* and does not require Supreme Court review.

C. THIS COURT NEED NOT ADDRESS PETITIONER'S FIFTH AMENDMENT CLAIM SINCE THE ARIZONA COURT OF APPEALS UPHELD PETITIONER'S TERMINATION ON THE GROUNDS THAT PETITIONER VIOLATED PIMA COUNTY SHERIFF'S DEPARTMENT RULES BY MISHANDLING DEPARTMENTAL RECORDS, AND THIS DETERMINATION WAS AN INDEPENDENT, SUFFICIENT GROUND FOR PETITIONER'S TERMINATION.

It is well settled that the Supreme Court will not reach a constitutional question if the state court judgment rests on more than one ground, one of which is non-federal in nature and adequate to support the judgment. *Fox Film Corp. v. Miller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). This rule was explained in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 567-568, 97 S.Ct. 2849, 2852-2853, 53 L.Ed.2d 965 (1977):

> "We are not permitted to render an advisory opinion, and if the same judgment would have

> been rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (Citing *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463 (1945)).

In this case, the judgment appealed from rests not only on the propriety of Petitioner's discharge for failing to answer his employer's questions after receiving a proper and adequate grant of immunity, but also on the propriety of his discharge for mishandling official departmental records and documents in violation of Pima County Sheriff's Department rules and regulations. While the first ground implicates a federal question, the second ground, the records violation, is clearly a matter of local law.

The Arizona Court of Appeals determined that Petitioner's termination for records violations was based on the hearing officer's conclusion and findings, which were supported by the evidence and not arbitrary. Appendix C, A-10. In his specially concurring opinion, Judge Livermore specifically stated that Petitioner's possession of jail records "provid[ed] an independent basis for discharge." Appendix C, A-16. Thus, even if this Court were to determine that the Arizona Court's view of federal law was incorrect, the Court of Appeals would still have upheld Petitioner's termination on the grounds that he violated Sheriff's Department Rules and Regulations regarding the handling of official documents and records.

Because Petitioner's dismissal for mishandling departmental records is an independent and adequate, non-federal ground for Petitioner's termination, the Petition should be denied.

D. PETITIONER WAS NOT UNLAWFULLY REQUIRED TO GIVE UP HIS CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION, BECAUSE HE HAD BEEN GRANTED IMMUNITY; THUS, PETITIONER'S DISCHARGE FOR REFUSING TO ANSWER QUESTIONS ASKED BY HIS EMPLOYER WAS NOT IMPROPER.

Petitioner argues that the Arizona Court incorrectly decided that he was properly terminated for failing to answer his employer's questions. He contends that he properly invoked his Fifth Amendment rights and that the employer's offer of immunity was invalid because it did not comport with this Court's decisions in *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968) and *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

Those cases stand for the proposition that a public employee can be discharged for refusing to answer his employer's questions if such questions relate narrowly, directly and specifically to the performance of his duties and if he is not required to waive immunity with regard to the use of his answers or the fruits of those answers at any related criminal prosecution. These cases do not expressly require that the employee be specifically informed that the fruits of his statements cannot be used against him.

It is well settled constitutional law that, just as a compelled statement may not be used against a defendant, neither may the fruits of that illegal statement. *See e.g., Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9

L.Ed.2d 441 (1963); *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The record clearly establishes that Petitioner was specifically told on more than one occasion that his answers to the interviewer's questions would not be used in any subsequent or parallel criminal proceeding. Appendix N, A-66; Appendix P, A-99 - A-100. Thus, Petitioner was not required to waive his Fifth Amendment immunity, as prohibited by *Gardner, supra* and its progeny. Because the fruits of a compelled statement are as inadmissible as the statement itself, *Wong Sun, supra,* it is not a constitutional defect that Petitioner was not specifically informed that the fruits of any statement, as well as the statement itself, would be inadmissible.[3]

Petitioner also argues that the questions asked did not relate specifically, directly and narrowly to the performance of his duties, which he claims is also a constitutional defect. While it is true that *Gardner* and its progeny speak in terms of questions that relate specifically, directly and narrowly to the employee's job performance, those cases do not define job performance. However, there is state law in Arizona defining job performance in the context of the questioning of a public employee prior to termination.

In *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1971), the Arizona Court of Appeals specifically

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[3] Indeed, Williams' concerns at the interview, as stated by his attorney, did not relate to the fruits of his answers, but to the authority of the Sheriff's Department employee who explained the immunity to them. Appendix N, A-67, and Appendix P, A-100.

held that the off-duty assaultive conduct of a city park guard was legitimately subject to employer inquiry because his private conduct violated the public trust, the upholding of which was part of the park guard's official duties. Williams' off-duty conduct also involved a potential violation of the public trust, because he was suspected of stopping young women late at night while impersonating a Sheriff's officer. This activity clearly falls within the parameters of *Mills* and was legitimately subject to employer inquiry under state law.

The Arizona court properly applied state law in determining whether Petitioner's conduct implicated his official duties and then properly applied the federal standards as to immunity. There was no constitutional violation.

CONCLUSION

The Petition For Writ of Certiorari should be denied because state court proceedings are still pending which could obviate the need for Supreme Court review of this case. Further, the Arizona Court of Appeals correctly applied the pre-termination requirements articulated in *Loudermill* and determined that a pre-termination interview at which Petitioner was informed of his employer's concerns, the rules he was suspected of violating and the evidence in support of those concerns and suspicions, and he was given an opportunity to respond, coupled with full post-termination administrative and judicial review, met and satisfied all applicable federal standards.

Finally, this Court need not address Petitioner's Fifth Amendment claim because his termination is based on grounds not implicating a federal question or right, and Petitioner was properly terminated for records violations alone, an independent state law ground. Further, there was no Fifth Amendment violation because the immunity granted to Petitioner was sufficient to protect his Fifth Amendment rights.

The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JASON WILLIAMS, Plaintiff, vs. PIMA COUNTY, et al., et ux. Defendants.	)	No. C-206997 **RULE 59 MOTION FOR NEW TRIAL** (Assigned to the Hon. Michael J. Brown)

Jason William, by and through his undersigned attorney, hereby files his Motion for a New Trial pursuant to Rule 59(a)(1)(2)(3) and (4), of the Arizona Rules of Civil Procedure. This Motion is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 28th day of September, 1990.

RISNER & GRAHAM

By /s/ Kenneth K. Graham
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A copy delivered this 28th day of
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MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

As this Court is aware, this case was recently remanded to this Court subsequent to an appeal by the Defendants. After the remand to this Court, the Court on August 28, 1990 signed the Judgment submitted by the Defendants. The Judgment was entered by the Clerk on September 17, 1989. Since an adverse Judgment has now been entered against the Plaintiff, Plaintiff is now requesting this Court to grant a New Trial pursuant to Rule 59(a)(1-4) of the Arizona Rules of Civil Procedure. This Motion for New Trial addresses issues which were not and could not have been considered by the Court of Appeals since the issues raised here were not addressed by this Court at the time of a Judgment and were not alternative basis which supported the prior Judgment of this Court which was overturned on appeal.

The issues raised in this Motion for New Trial are as follows:

(1) Did this Court err in denying Plaintiff's Motion to Compel dated January 20, 1984;

(2) Did this Court err in denying Plaintiff's Motion for a Trial De Novo filed on May 7, 1986; and

(3) Should a New Trial be granted pursuant to Rule 59(a)(4) as a result of newly discovered material

evidence which establishes that the Merit Commission's decision terminating Jason Williams for refusing to answer questions was arbitrary and capricious.

FACTS

In Plaintiff's Complaint dated January 25, 1983, the Plaintiff made a demand that the entire record of the Commission proceedings be made a part of this proceeding. The Plaintiff specifically requested that the transcript, if any, of the Agency Proceedings be produced. See Complaint Count Two Paragraph X. A certified copy of the Record of the Administrative Hearing was not filed by the Defendants. On January 20, 1984, Plaintiff filed a Motion to Compel the filing of the Record of the Administrative Hearing pursuant to A.R.S. §12-909. Although this Motion was initially granted on February 21, 1984, a rehearing was granted as a result of the Defendant's claim that they had not received a copy of the Motion.

On July 31, 1984, prior to the rehearing, the Pima County Merit System Commission filed the certified copy of the proceedings below with the exception of the transcript of the hearing which was held before the Pima County Merit Commission. In their Response to the Plaintiff's Motion to Compel the Defendants all agreed that a certified copy of the record before the Administrative Record should be filed. However, the Defendants maintained that they should not be required to produce a transcript of the proceedings at the hearing. In this regard, the Defendants relied on Rule 13.4(B)(7)(a) of the

Pima County Merit System Commission Rules. On August 21, 1984, the Motion to Compel was denied.

On May 7, 1986, Plaintiff's counsel filed a Motion for Trial De Novo based upon Plaintiff's understanding that the transcript of the Administrative Proceedings below had been destroyed. *See* A.R.S. §12-910(B). The Defendants again responded contending that it was the Plaintiff's obligation pursuant to Pima County Ordinance No. 1975-36, Section 19B(1) and Pima County Merit Commission Rule 13.4(B)(7), to obtain the transcript of the proceedings.

In support of their Opposition to the Motion for Trial De Novo, the Merit Commission filed the Affidavit of Heather Armstrong who was the Court Reporter at the October 21, 1982 hearing before the Pima County Merit Commission. In that Affidavit at paragraph 10, Ms. Armstrong stated that when a request for a transcript was made by Michael Brady in the first half of 1985, Mr. Brady was advised that a complete transcript could not be produced since the stenotype papers and a substantial portion of the cassette tape recordings were no longer available. Paragraph 14 of that Affidavit reveals that part of the cross-examination of Jason Williams, part of the redirect examination of Jason Williams, part of Gary Peterson's testimony and most of the testimony of David Heupel could not be reproduced.

Recently, new evidence has come forth establishing that the Merit Commission acted arbitrarily in terminating Mr. Williams for refusing to answer questions. This new evidence takes the form of the determination made by the Pima County Law Enforcement Officers Merit

System not to uphold the termination of Deputy Penner, who was terminated by Sheriff Dupnik based upon his refusal to cooperate with an internal affairs investigation. Although a different Merit System Commission was involved, it is undersigned counsel's belief that the members of the Pima County Law Enforcement Officers Merit System are the same as the members of the Pima County Merit System Commission. If anything, the circumstances for the termination of Mr. Penner were stronger as it was clear that the subject matter of the internal affairs investigation involving Deputy Penner was conduct that occurred unquestionably during the course and scope of his employment. Plaintiff will attempt to obtain a copy of the Hearing Officer's Report re: Penner to provide to this Court.

LAW AND DISCUSSION

A.R.S. §11-356 provides, in pertinent part, as follows:

> "(A) Any officer or employee in the classified Civil Service may be dismissed, suspended or reduced in rank or compensation by the appointing authority after appointment or promotion is complete only by written order, stating specifically the reasons for the action. The order shall be filed with the Clerk of the Board of Supervisors and a copy thereof shall be furnished to the person to be dismissed, suspended or reduced.
>
> (B) The officer or employee may within ten days after presentation to him of the order, appeal from the order to the Clerk of the Commission. Upon the filing of the appeal, the Clerk shall forthwith transmit the order and appeal to the Commission for hearing.

> (C) Within twenty days from the filing of the appeal, the Commission shall commence the hearing and either affirm, modify or revoke the order. The appellant may appear personally, produce evidence, have counsel and, if requested by the appellant, a public hearing.
>
> (D) The findings and decisions of the Commission shall be final, and shall be subject to administrative reviews provided in Title 12, Chapter 7, Article 6. [A.R.S. §12-901 et. seq.]"

A.R.S. §12-909 provides, in pertinent part, as follows:

> A. The Complaint shall contain a statement of the findings and decisions or part thereof sought to be reviewed, and shall clearly specify the grounds upon which review is sought. It shall also state what portion of the record and transcript, if any, *shall be filed by the agency* as part of the record on review.
>
> B. Except as otherwise provided, the administrative agency *shall* file an answer which shall contain the original or a certified copy of the portion of the record designated in the Complaint. The answer of the agency may also contain other portions of the record as the agency deems material. By order of the Court or by stipulation of all parties to the action, the record may be shortened or supplemented. (emphasis added).

In the case at bar, the Commission delegated to a Hearing Officer the responsibility to hold a hearing and make a recommendation regarding Mr. Williams' appeal. In *Schmitz v. Arizona State Board of Dental Examiners*, 141 Ariz. 37, 684 P.2d 918 (App. 1984), the Court considered the appeal of an orthodontist who was censured by the Board of Dental Examiners. In that case, the Board of Dental Examiners referred a complaint to an investigative

committee which conducted a hearing and issued a report containing findings of fact, conclusions of law and recommendations to the Board. The Board reviewed the Committee Report and issued its order censuring Schmitz and directing restitution and probation. 141 Ariz. at page 40. Schmitz appealed the ruling of the Board to the Superior Court. The Board filed a certified record pursuant to A.R.S. §12-909(B). Schmitz requested a trial de novo on the grounds that although a transcript had been made it was so inaccurate that the trial court could not properly review the record. The Superior Court denied the motion and upheld the action of the Board.

On appeal to the Court of Appeals, the Court noted that the transcript which had been provided pursuant to A.R.S. §12-909(B) consisted of 21 pages which contained 32 designations of "inaudible" for comments or testimony of an indeterminate length.

The Court of Appeals held as follows:

> "When considering whether there is substantial evidence to support the agency's decision, the Superior Court must review the "entire record". A.R.S. §12-910(A). *See Arizona State Board of Medical Examiners v. Clark*, 97 Ariz. 205, 398 P.2d 908 (1965). The "entire record" is defined as all evidence received and considered, including the transcript. A.R.S. §41-1009(E)(2) and (F)" 141 Ariz. at page 40.

The Court of Appeals further held that "[T]he Board ignores the fact that upon request by any party, it was responsible for preparing an adequate transcript of the investigative committee meeting. *See* A.R.S. §41-1009(F) and 12-909(B)." 141 Ariz. at page 41. The Court ultimately

concluded that since the record was inadequate, the judgment of the trial court affirming the Board's determination should be reversed and the matter was remanded to the Superior Court for a trial de novo pursuant to A.R.S. §12-910(B).

In *United Farm Workers of America, AFL/CIO, v. Agricultural Employment Relations Board,* 149 Ariz. 70, 716 P.2d 439 (1986), the Court of Appeals considered the issue of whether administrative transcripts should be made part of the record in an appeal pursuant to A.R.S. §12-901 et. seq. The Court noted that A.R.S. §12-909(A) was phrased in mandatory language. The Court held that before the trial court could review appellant's claim, it was required to order the Agricultural Employment Relations Board to supplement the record with the transcripts. 149 Ariz. at page 75.

The Defendant's reliance upon Pima County Merit Commission Rules is misplaced. The Arizona Legislature provided, pursuant to A.R.S. §11-356 that the findings and decisions of the various County Merit Commissions should be subject to administrative review by the Superior Court pursuant to A.R.S. §12-901 et. seq. A.R.S. §12-909(B) provides in mandatory language that the administrative agency shall file the original or a certified copy of the portion of the record designated by the Plaintiff in the Complaint. A.R.S. §12-909(A) defines the record on review as including the transcript if requested. Mr. Williams requested the transcript and it was not provided. Quite simply, neither the County Board of Supervisors, by ordinances, nor the Pima County Merit System

Commission has the authority to overrule the Legislature's mandate that the administrative agency be responsible for providing the Superior Court with the administrative record including transcripts if requested.

Moreover, a review of the Pima County Ordinance and the Pima County Merit System Rules relied upon by the Defendants reveal that those rules can be read consistent with the Legislative Enactments.

Pima County Ordinance 1975-36 §19(B) provides as follows:

> "The Commission shall prepare an official record of the hearing, including all testimony recorded manually or by mechanical device, and exhibits, but it shall not be required to transcribe such records unless requested by the employee who shall be furnished with a complete transcript upon payment of the actual cost."

This Ordinance defines the official record of the Commission as including testimony which was recorded manually or by mechanical device. The Ordinance requires the Commission to transcribe the recorded testimony upon the request of an employee. Only after the transcript has been completed is the employee, under the Ordinance, required to make payment of the actual cost in order to be furnished with a complete transcript. Therefore, it is the responsibility of the Commission to obtain a transcript of the testimony upon the request of the employee. Since the employee is required to make payment of the "actual cost", and since the "actual cost" can only be determined after the transcript has been provided, and since the payment for the transcript is

made to the Commission, it is clear that it is not the employees responsibility, under the Ordinance, to order the transcript from the Court Reporter. At most the Ordinance provides that in order to be furnished with a complete transcript the employee must make payment of the actual cost.

Rule 13.4(B)(7) of the Pima County Merit System Commission Rules provides as follows:

> "All testimony at the hearing shall be recorded manually or by mechanical or electronic device. The Commission shall pay all charges incurred in connection with the presence of a Court Reporter or the utilization of mechanical or electronic devices, excluding, however, the cost of preparation of all or any part of the transcript. The cost of a copy or copies of any such transcript shall be paid by the party or parties ordering the same."

Clearly, this rule does not require the employee to pay the cost of a copy or copies of any transcript. Rather, the cost of a copy or copies of the transcript are to be paid by the party or parties ordering the same. Pursuant to A.R.S. §12-909(A) the transcript "shall be filed by the agency" as part of the record on review. Therefore, if the purpose for obtaining a transcription is for an administrative review pursuant to A.R.S. §12-901 et. seq., A.R.S. §12-909 requires the Commission to order and file portions of the transcript which are designated by the employee and the Complaint filed in the Administrative Appeal. If the employee wanted a portion of the testimony transcribed for some purpose other than the Administrative Appeal, Rule 13 of the Pima County Merit System Commission Rules would be valid authority for

the proposition that the employee would be required to pay for that transcript. However, that is not the factual scenario before this Court.

Plaintiff respectfully submits that this Court erred in denying Plaintiff's Motion To Compel. The transcript should have been prepared by the Merit Commission, and filed with the Answer to Plaintiff's Complaint.

It is now clear that the "entire record" is not available for this Court to review as required by *Schmitz v. Arizona State Board of Dental Examiners, supra*. Since the entire record is not available, a trial de novo should be granted. *Id.*

Finally, the fact that another employee's termination was not upheld where that termination was based upon the same reason Plaintiff was terminated, establishes that Jason Williams' termination was arbitrary and capricious.

Plaintiff respectfully requests this Court to grant Plaintiff a new trial for the above stated reasons.

RESPECTFULLY SUBMITTED this 28th day of September, 1990.

RISNER & GRAHAM

By /s/ Kenneth K. Graham
Kenneth K. Graham, Esq.